

ACTIONS IN GENERAL ASSUMPSIT

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I. WHY AND IN WHAT MANNER GENERAL ASSUMPSIT SURVIVES

The forms of action have been dead for over a century—long live their terminology! Wrapped up in that terminology has been much basic learning about pleading, causes of action, and remedies, and the development of replacement language has been slow. Slowest has been progress in the action of assumpsit in the division called general assumpsit.

Last of the common law forms of action to appear, assumpsit was developed by the courts to meet needs arising from the shift of English society from medieval rigidity and relative simplicity into the freedoms, flexibility, and complexity of modern life. Dragging along some of the old concepts, the ancient one of debt particularly, serving as the major vehicle for adding flexibility and complexity to relationships through modern contract law, it also served as the spawning ground in law actions for developing at a rather late date an entirely new remedial principle, early labelled quasi-contract and now more broadly identified as restitution. Untangling restitution from procedural language, and adjusting substantive law concepts and other remedial ideas to its impact as it cuts through contracts and other fields, have been slow processes, still vigorously going on.¹ The language of assumpsit has been a key to precedents old and often new, as its terms have served as landmarks for the pleader. The purpose of this study is to pull together the clearer Ohio precedents and the newer concepts into a pattern useful to the pleader, as a basis for classifying his cause of action and dealing with it in an appropriate fashion at various procedural stages.

To untangle pleading rules, substantive law, and remedial principles, Ames's historical account of the development of assumpsit is almost indispensable.² Only a conceptual summary is here attempted. Being "at law" the remedy of assumpsit purported to be "damages," and of course a great function of special assumpsit was the recovery of unliquidated damages for breach of contract. The simple "promise" was in this sense "enforceable" in special assumpsit. Very early, however, "debt" was also literally enforceable in general assumpsit and

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¹ See generally Restatement, Contracts (1932), *passim*; Restatement, Restitution (1937); Corbin, Contracts, "Damages," "Restitution," and "Specific Performance" (1950); Symposium, "Damages in Contract," 20 Ohio St. L. J. 173-327 (1959).

² Ames, Lectures on Legal History, chs. 12-15 (1913); Ames, "The History of Assumpsit," 2 Harv. L. Rev. 1, 53 (1889).

soon also in special assumpsit, debt being a duty to pay a liquidated sum or sum certain of money which defendant unjustly detained. Though the idea of promise was not part of the debt concept, a promise was "implied" out of the transaction from which it arose, not a far stretch if it were a loan or bargain and sale, but the fiction fitted the allegations to the form of action. Little more fictitious was the implied promise in implied-in-fact contracts. But when the promise was "implied in law" in various contractual and non-contractual transactions, the fiction was pretty obvious and the courts felt the need to call upon the "equitable principles" of quasi-contract to justify the fiction. Yet an obligation to pay a sum of money founded upon law rather than promise was not at all alien to the debt concept, so bringing the quasi-contract or restitutional cases within general assumpsit was not doing obvious violence to its remedial principle. Even in the more ancient action of debt, the obligation enforced was often "founded on law" being a payment required by statute or custom.

Reading the words and tracing the decisional pattern of numerous great judges, it is clear that the basic concepts of assumpsit were the true promise, express or implied in fact, and debt, a very simple and basic notion of obligation. Out of the true promise came the substantive law of contracts. Out of debt, when freed of the limits of promise, a limit threatened by association in assumpsit, came the remedial structure of restitution. General assumpsit remained the pleading form for enforcing all debt obligations, whether founded on a true promise or not, and this protean simplicity after its first usefulness diminished has meant much groping and confusion.

Since assumpsit developed its own forms of pleading, the language of assumpsit today is used in three different connections: (1) as a type of pleading, particularly the highly simplified style of the common counts; (2) as a means of identifying and defining causes of action; and (3) to point to or distinguish the remedies of unliquidated damages, debt, and restitution.

II. TERMINOLOGY AND BASIC DEFINITIONS

Special assumpsit "lies for the recovery of damages for the breach of simple contract, either express or implied in fact."³ In special assumpsit the contract was specially pleaded and the gist of the cause was failure to perform the alleged promise. Special assumpsit was the necessary form where the contract remained executory, *i.e.*, not fully performed on plaintiff's part, or where defendant's promise was to do an act other than the payment of money.⁴ On the other hand, special

³ Shipman, *Common Law Pleading* 148 (3d ed. 1923).

⁴ In Ohio, on non-performance by defendant of the promised act other than the

assumpsit was still appropriate though plaintiff had fully performed and defendant's unperformed duty was merely to pay a sum specified in the contract. In the first of those two cases, the remedy was unliquidated damages determined by the reasonable value of the promised performance, plus compensation for any foreseeable consequential injuries, while in the second, plaintiff could only recover for the debt and damages for its detention.⁵

General assumpsit, sometimes referred to as the common counts in assumpsit, lay generally to enforce a duty to pay money. In the *indebitatus* counts the duty enforced was debt, a sum certain fixed by agreement of the parties or by statute or custom, while in the *quantum meruit* and *quantum valebant* counts, the duty was to pay plaintiff what he reasonably deserved for his services, or, what the goods furnished were reasonably worth, the sum not having been fixed by express agreement. In *indebitatus assumpsit* the usual money counts were: money paid to the use of defendant, money had and received to the use of plaintiff, money lent, interest due, and balance due on account stated. Other *indebitatus* counts were goods sold and delivered; land bargained and sold; work, labor and services; work, labor and materials; use and occupation of land; board and lodging; liability imposed by statute to pay money; and any other circumstances upon which a debt may be founded.

From the labels of the common counts it may be noticed that if there was a contract, it had been executed on plaintiff's side by passage to or for defendant of a quid pro quo, something of value, a fact which was essential for raising a debt obligation except where it was raised by grant or by obligation of law. In the earlier cases the strict requirement of certainty of amount in pleading a debt left a clear sphere for the quantum counts despite the fact that the duty enforced was like that of debt except as to certainty. When the judges later relaxed the requirement of certainty by holding that the sum due could be made certain by the jury, the practical distinction between the *indebitatus* and quantum counts disappeared with the result that any case appropriate for the latter could also be stated in the former. The obliteration of this line between the *indebitatus* and quantum counts explains the appearance of quasi-contract cases under both types of counts since earlier many of the claims would have lacked the certainty of amount required for debt. Curiously, however, the theoretical distinction between the two is preserved in the present phrase

payment of money, the contract becomes one for money. *Newman v. McGregor*, 5 Ohio 349, 24 Am. Dec. 293 (1832); *Dixon v. Kittle*, 109 Ohio App. 257, 164 N.E.2d 806 (1959).

⁵ Restatement, Contracts § 326, Comment b (1932); Corbin, Contracts, § 995 (1950).

that plaintiff may recover in the *quantum meruit*, the denotation being that his measure will be "reasonable value" in terms of market value, as distinguished from the agreed or contract price. This usage is frequent in express contract cases when quasi-contract relief is given instead of damages or debt.

Quasi-contract relief in assumpsit is available only in general assumpsit, either in a count specially pleading the facts or commonly in the common counts of money had and received, goods sold and delivered, perhaps money paid to the use of defendant, and in the quantum counts. The term quasi-contract is used here frequently in place of restitution, though with some hesitancy, because it is widely used in the Ohio cases, its use to designate the kind and occasions for restitutional relief available "at law" is rather common,⁶ and in connection with pleading problems it seems appropriate to keep in mind the difference between the bare restitutional cause of action leading to a judgment at law and the usually more elaborate statement of facts necessary to support an equitable form of restitution.

III. THE STYLE OR FORM OF PLEADING IN GENERAL ASSUMPSIT

While it may have been customary at common law to plead in general assumpsit only in the set forms of the common counts, a form so general in essential allegations after the verbiage is eliminated, as sometimes to be said to consist only of conclusions of law, pleading practice under the Ohio code is more complex. Four different situations and sets of problems are reflected in the Ohio cases: (1) a petition more or less in the common law form of common count, characterized by allegations according to legal effect; (2) the statutory short-form petition; (3) a special pleading of the cause, alleging in some detail the facts of the transaction; and (4) a petition drawn to plead an express contract or a tort claim, which runs into difficulties because of failure of proof, statute of limitations or frauds, various joinder or procedural problems, poor recovery prospects, or perhaps other reasons making a switch to general assumpsit desirable.

(1) The succinctness of the common count,⁷ condemned in some states as inconsistent with the fact-pleading requirement of the code, has never been held insufficient in an Ohio reported decision, or even clearly criticised. Two cases seem to have been misread as criticism. In *Yocum v. Allen*,⁸ appellant's brief pointed out that the pleading,

⁶ Restatement, Restitution, index, "Quasi Contract" (1937).

⁷ See Gardner's Bates, Ohio Civil Practice, Form 238.24, "Money Had and Received," and Form 266.17, "Quantum Meruit" (1959); See F.R. Civ. P. Forms 4, 5, 6, and 8.

⁸ 58 Ohio St. 280, 50 N.E. 909 (1898).

in form a money had and received count, was incomplete by failing to allege nonpayment, and the Supreme Court also noted a failure to allege to whose use the money was received. In spite of such deficiencies, the court refused to reverse after verdict without a showing on the whole record of prejudicial error. Nothing in the brief or opinion suggests the need for anything more than a good common count. In *McNutt & Ross v. Kaufman*,⁹ a very uncertainly-pleaded count for money had and received, followed by an answer which made a poor stab at pleading an express contract, produced the remark by the court: "The pleadings in this case, to say the least, should not be adopted as precedents."

While a few statements in lower court opinions may be found that the common count may be subject to a motion to make more certain, there is a lack of evidence that such motions are commonly sustained. In addition to some express approval, there is much implied approval by failure of the courts to discuss the common counts when used, or even by a categorization of detailed pleading as amounting to one of the common counts, without further discussion. In *Middleport Woolen Mills Co. v. Titus*,¹⁰ against a specific objection to a petition "substantially in the form" of a money had and received count, the court declared the pleading sufficient "not because of the sufficiency of the pleading under the former system, but for the reason that its language is in accordance with the facts in the particular case."¹¹ Historically, the common count is in good standing in Ohio.

(2) The statutory short form of pleading a claim on an account or on an instrument for the unconditional payment of money¹² could strike one as anomalous in view of code emphasis on fact-pleading. In the light of the brevity of the forms appended by the code commissioners to the recommended code, it seems fair, however, to appraise this provision as specific encouragement to concise pleading. Since the common count was reputed to involve fictions, and perhaps also because of the complexity of assumpsit as compared to the simplicity the commissioners hoped for, it may be the commissioners expected the common counts to disappear. Whatever the intent, this statutory form does overlap the area of general assumpsit or the common counts as was recognized by the Supreme Court in *Dallas v. Furneau*.¹³ The court said that such a petition stated a claim "on an implied contract for the payment of money" and was in harmony with good common

⁹ 26 Ohio St. 127 (1875).

¹⁰ 35 Ohio St. 253 (1879).

¹¹ *Id.* at 257.

¹² Ohio Rev. Code § 2309.32 (1953).

¹³ 25 Ohio St. 635, 638 (1874).

count pleading, but held the allegation as to the amount due to be a part of the cause of action, not a mere *ad damnum* clause, with the result that failure to deny the allegation constituted an admission of its truth and thus permitted entry of judgment on default without taking proof as to the amount due. As noted below, Ohio lawyers have found it possible to reduce a good many claims to "an account" form, in order to use the statutory form of pleading, but the courts have continued to treat such petitions as involving common count pleading problems, so far as the analysis of issues is concerned.¹⁴

(3) Since it is obvious in pursuing Ohio citations that lawyers frequently undertake to plead general assumpsit claims specially rather than in common count form (*i.e.*, have pleaded the entire transaction in some detail),¹⁵ and since it is usually uncertain just why the choice was made, it seems best to consider some major considerations which should enter into the choice. If the available evidence makes it clear that the facts and the desired recovery fit a well-known common count, the use of the count may not only block motions and demurrers, but it also gives the action an unmistakable characterization, with authority generally easy to find to support the theory and the recovery. On the other hand, if the facts of the case to be pleaded cannot be compressed into the relatively simple legal-effect formulae of the common counts, it may be simpler to allege the facts of the background transaction, contractual or otherwise, which serve to raise the debt or quasi-contractual obligation. Chiefly needed is a clear theory of the recovery sought, for the facts necessary to show the cause of action are essentially simple in nature.¹⁶ Resort to special pleading may be more frequently necessary in restitution cases because of the limited number of common counts recognized for such recovery. If available evidence makes it uncertain what specific ground of recovery may be established, special pleading may definitely be advisable. In the contract cases, as will be shown, the form of the pleading in Ohio is nearly inconsequential. In other areas, particularly when different aspects of the situation might serve to support different theories of relief or measures of recovery, there may be little choice but to set out the transaction as a whole. The old example is the case where plaintiff may be uncertain about "goods sold and delivered" for the market value against the converter because "money had and received" might be more productive if the scoundrel has sold the goods above market by some additional knavery. Since using two separate counts in the petition for one cause of action seems doubtful

¹⁴ See division IV, *infra*.

¹⁵ Corbin contends this is always proper. Corbin on Contracts § 1102.

¹⁶ See division IV, *infra*.

of propriety in Ohio,¹⁷ and combining two common counts into one count is unheard of, special pleading, perhaps even with alternative allegations and prayers, may be the sole possibility. A very important consideration in many restitution cases is the fact that equitable relief in the form of constructive trust, equitable lien or subrogation may turn out to be of vital consequence to recovery, particularly if defendant turns out to have numerous creditors. Special pleading of the facts would be necessary if equitable relief were demanded, or expedient if the door to equity is to be kept open.

(4) Though the original pleading is framed on a clear theory of express contract, or even of tort where unjust enrichment may be inferred, there should be no doubt in Ohio that the theory of pleading is not binding,¹⁸ and if the facts pleaded or subsequently proved will support a general assumpsit recovery, *i.e.*, establish a duty in the nature of debt or quasi-contract, the complaint and proof should be held good against an objection of want of cause of action. Switching horses by amendment, if necessary, involves no special hazards.¹⁹

IV. "CONTRACT" RECOVERY UNDER GENERAL ASSUMPSIT: DEBT FROM PERFORMANCE

As has often been said, if the contract is fully performed on plaintiff's side and all that remains on defendant's side is the payment of money, an *indebitatus* or common count will lie. To consider this as merely an exception to the requirement of specially pleading the special contract is misleading. Performance has changed the jural relations of the parties by creating a debt duty on defendant and the change eliminates plaintiff's other rights to recover. Plaintiff can no longer ask for unliquidated damages,²⁰ nor "rescind" to ask for restitution on the ground of defendant's nonperformance.²¹ Plaintiff can only sue to recover the debt and damages for withholding it. If plaintiff calls his action special assumpsit, he nevertheless recovers the debt. But anciently, *indebitatus assumpsit* involved pleading debt so that form of action is certainly available, with its simplicity of pleading.

The nature and simplicity of the debt cause of action arising

¹⁷ *Weber v. Billman*, 165 Ohio St. 431, 135 N.E.2d 43 (1956); *Ferguson v. Gilbert*, 16 Ohio St. 88 (1865); *Sturges v. Burton*, 8 Ohio St. 215 (1858); *Womack v. Hollon*, 60 Ohio L. Abs. 465, 478 (1951); *Murphy v. Quigley*, 11 Ohio C.C. Dec. 638, 21 Ohio C.C.R. 313 (1900), *aff'd without opinion*, 65 Ohio St. 598 (1901); *Boswell v. Security Life Ins. Co.*, 13 Ohio N.P. (n.s.) 364, 30 Ohio Dec. 581 (1912).

¹⁸ 43 Ohio Jur. 2d, "Pleading," §§ 32, 90, 91, 92 (1960).

¹⁹ See following section.

²⁰ *McCormick*, Damages § 138, at n.7 (1935).

²¹ Restatement, Contracts § 350 (1932).

out of a contractual transaction are pretty clearly reflected in two noteworthy Ohio cases. In *Cincinnati v. Cameron*,²² plaintiff had undertaken in an elaborate contract with the city to construct a hospital building. After completion plaintiff filed pleadings "general in form," consisting of a statutory short-form petition with a lengthy account attached covering all items of construction, including additions and modifications which were never authorized in writing as the contract required, but which had been authorized orally. After reviewing the considerable mass of facts developed in the trial, the court concluded as to the exceedingly brief pleadings:

A petition may be so made, although there was a special contract, if it had been fully performed, or if the additions or modifications had been sanctioned by defendants, and in such case *indebitatus assumpsit* would lie, or plaintiff might elect to plead specially.

The court's perception of the basic change in the cause of action is perhaps most clearly indicated by its observation that the city's answer had failed to tender issues on numerous points sought to be raised in the trial or later, including general liability, particular items of the account, want of written orders, and want of power in the board. "All of these matters were substantial matters of defense, and should have been pleaded. . . ."²³ In short, some matters vital in special assumpsit pleading are not part of the debt cause of action.

Some of the language of the court in *Railway Co. v. Gaffney*²⁴ has reappeared in numerous Ohio discussions involving debt pleading problems. In that case, the court felt impelled to explain why evidence of an "implied contract," meaning a quasi-contract claim, was admissible under a petition alleging an express contract:

There is, as we have shown, no generic difference between an express contract and one implied from circumstances. The plaintiff was not required to state the character of the evidence on which he would rely to support the averment, that the services were rendered under a contract with the defendant. It was therefore competent for him to offer the circumstances under which he did the work, in support of his averment that it was done "at the instance and request" of the defendant.

Work having been done, the court is saying that the particulars of the transaction, whether those of express or implied-in-fact contract or quasi-contract, are merely "evidence" of the ultimate facts raising the debt obligation, *i.e.*, the receipt of a quid pro quo by defendant at his request. When it is stripped to essentials, no other matters are covered by the allegations of the common count.

²² 33 Ohio St. 336 (1878).

²³ *Id.* at 356, 357.

²⁴ 65 Ohio St. 104, 61 N.E. 152 (1901).

In *Gilmour, Admr. v. Cross*,²⁵ proof tending to show an express contract was upheld under a petition in *quantum meruit*; in *Harper v. Miller Aviation Co.*,²⁶ with an express contract pleaded, evidence to sustain a recovery on implied contract was upheld. In *Gorey v. Gregg*,²⁷ when objection to evidence was raised, plaintiff was permitted to amend her petition from express to implied contract, the court citing *Bolsinger v. Halliday*,²⁸ where a reverse switch had been upheld. In *Price v. Cleveland Tr. Co.*,²⁹ the court upheld an amendment to make the petition allege both express and implied contract. In both the *Bolsinger* and *Price* cases, objection was raised to the amendment as coming after the statute of limitations barred the filing of a new cause of action, and in both the holding was that the amendment introduced no new claim, the cause of action being the same as that originally pleaded. The rulings in the foregoing cases were all more or less clearly bolstered by language from the *Gaffney* case, and it is interesting to note a similar reliance in *Gebhart v. United States*³⁰ to sustain the conclusion that a mechanics' lien may be based on an implied-in-fact contract, though not on an implied-in-law or restitutional cause.

The frequent use of short-form petitions "on an account" to recover contract debts suggests a question of how to determine what may be included in the account. Such "accounts" have ranged from one item, a single fee for legal services,³¹ to 200 items of performance under the building contract in *Cincinnati v. Cameron*.³² While obviously many of the contracts have not involved proof under the shop book rule, such discussion as was found as to what properly comes within an account was in terms of the evidence rule.³³ Perhaps custom has already broken down those shadowy boundaries. In any case, the slight probability of frequent suits based on shop books, the fact that all of the issues of special assumpsit can be raised by defensive pleading,³⁴ and the general liberality in dealing with pleadings in general

²⁵ 20 Ohio App. 127, 151 N.E. 782 (1925). *Contra*, *Cole v. Kiner*, 44 Ohio L. Abs. 407, 63 N.E.2d 839 (1945); 47 Ohio L. Abs. 568, 70 N.E.2d 119 (1946).

²⁶ 109 Ohio App. 269, 164 N.E.2d 754 (1957).

²⁷ 78 Ohio App. 367, 63 N.E.2d 680 (1945).

²⁸ 4 Ohio App. 311 (1915).

²⁹ 45 Ohio L. Abs. 606, 68 N.E.2d 133 (1944).

³⁰ 172 Ohio St. 200, 174 N.E.2d 615 (1961).

³¹ *Herkins v. Perrin*, 55 Ohio L. Abs. 328, 86 N.E.2d 472 (1949).

³² *Supra* note 22.

³³ *Ludwig Hommel & Co. v. Woodsfield*, 115 Ohio St. 675, 155 N.E. 386 (1927); *Dallas v. Furneau*, 25 Ohio St. 635 (1874); *Krueger v. Frazier*, 31 Ohio App. 28, 166 N.E. 151 (1928); *McKemy v. Goodall*, 1 Ohio C.C.R. 23, 25, 1 Ohio C.C. Dec. 14, 16 (1885).

³⁴ *Ludwig Hommel & Co. v. Woodsfield*, 115 Ohio St. 675, 155 N.E. 386 (1927);

assumpsit, are factors inconsistent with restrictive definitions. Certainly a great many of the debts arising from ordinary contract performance seem to come within the spirit of the provision.

V. GENERAL ASSUMPSIT AS THE MEANS TO QUASI-CONTRACT RELIEF

The ambiguity of language used in classifying Ohio quasi-contract cases has perhaps caused more wasted time in searching for them and trouble in stating their holdings than incorrect results. Assuming that the writer's own travail in attempting to survey the cases might be a fair test of the need, a brief and general classification is attempted in the following sections, aimed at making some of the clearer Ohio precedents more readily available to the pleader.

The range of cases is from those involving total breach of a contract by defendant, where restitution becomes an alternative to the damages and specific performance remedies, through cases where a contract is involved in one sense or another but the only relief may be restitution, to cases where any contract aspects are wholly disregarded because some over-riding concept fixes liability on the restitutional basis, and on to cases where the relations were never contractual but where restitutional relief may be either better or essential.

Without venturing further into restitutional principles, it is essential to recall that restitution as provided by general assumpsit actions is measured in nearly all cases without regard to valuations to be found in an agreement, but rather by the unjust enrichment of defendant.³⁵ In the contract cases the measure of restitution is commonly the value of plaintiff's performance rather than the value of defendant's promised performance.³⁶

Defendant's Total Breach of Contract

When defendant breaches his agreement by repudiation or performance less than complete, plaintiff has the possibilities of resort to "damages" to put him in as good a position as full performance would have given him or a suit for specific performance. If plaintiff has partly performed before defendant breaches the contract and if the breach is such as to go "to the essence" of the contract, that is, to be "total" in the language of the Restatement of Contracts,³⁷ then a third remedy becomes possible, that of restitution.³⁸ Since by the

Dykeman v. Johnson, 83 Ohio St. 126, 93 N.E. 626 (1910); Cincinnati v. Cameron, 33 Ohio St. 336 (1878); W. H. Davis Dye Co. v. Beltz-Hoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).

³⁵ Restatement, Restitution, ch. 8, topic 2 (1937).

³⁶ Restatement, Contracts § 347 (1932); Corbin, Contracts § 996 (1950).

³⁷ See §§ 317, 326 (1950).

³⁸ Restatement, Contracts § 347 (1932); Corbin, Contracts § 1104 (1950).

agreement the parties have fixed the equivalency of the values to be exchanged, defendant is estopped to deny that his failure to complete the exchange by performance has unjustly enriched or benefitted himself. Thus the measure of the restitutional recovery is the value of the performance rendered by plaintiff. Such a measure is required if the plaintiff is to be put approximately in as good a position as he had *before* the contract.

In *Doolittle v. McCullough*,³⁹ the trial court gave an instruction which allowed a restitutional recovery, saying that if defendant terminated the contract without consent of plaintiff, the latter was not bound by the contract price and could recover what the work done was actually worth. The petition appeared to be a debt count for work and labor. Declaring the instruction erroneous, the Supreme Court discussed and approved only the contract rule of damages, *i.e.*, the contract price for the portion done plus profit on the remainder which could not be performed, and then noted that plaintiff clearly would have lost money if he had completed performance. Some 36 years later in *Wellston Coal Co. v. Franklin Paper Co.*,⁴⁰ the court recognized restitution as an alternative to damages, declaring it well settled "that when full performance of a contract has been prevented by the wrongful act of the defendant, plaintiff has the right either to sue for damages, or he may disregard the contract and sue as upon a *quantum meruit* for what he has performed."⁴¹ The holding of the case is consistent with the rule stated, that is, that plaintiff was entitled to recover at the market rate at times of delivery, times when the market was higher than the contract price which had been based on a full year's range of fluctuations. But the attempt of the court to reconcile the instant case with *Doolittle*, a difficult thing since the latter involved only the damage remedy and the instant case only restitution, resulted in some confusion in syllabus and opinion. The court fell into the trap of the factual differences of the two cases, the proof in *Doolittle* strongly suggesting that plaintiff was better off because of defendant's breach, while the reverse was clear in *Wellston*. As the authorities cited in *Wellston* show, it is the fact of defendant's breach, his withholding of the full agreed exchange, which determines the fact of unjust enrichment, not the question of whether plaintiff can *prove* he is worse off than if he were permitted to complete performance, or more properly, that the defendant is better off. Having tossed the contract out of the window, defendant is in no position to recall it for any purpose, such as to demonstrate that it was not a good con-

³⁹ 12 Ohio St. 360 (1861).

⁴⁰ 57 Ohio St. 182, 48 N.E. 888 (1897).

⁴¹ *Id.* at 185.

tract for plaintiff anyway. The difference in effect is very important to the enforcement of contract obligations. The evil of choosing the wrong method for determining "unjust enrichment" is that the wrong rule may help the defaulter go scot-free, while the correct one offers a good chance of taking away the fruits of his wrongdoing.

In the area of service contracts, the principle of allowing recovery upon *quantum meruit*, where defendant "voluntarily abandoned" the contract and prevented full performance by plaintiff, was clearly recognized in *Ralston v. Kohl's Admr.*,⁴² the court assuming the valuation of the services rendered to be a proper issue. In *Cleveland Co. v. Standard Amusement Co.*,⁴³ when a contract for advertising for a year at a reduced rate was repudiated by the purchaser, recovery for all copy published was allowed at the much higher rate for casual advertising, the court explicitly rejecting all reference to the express contract as a means of limiting recovery. While the "right" of the client to dismiss his attorney at any time has produced some unusual decisions as to the recovery of fees agreed to in advance, apparently a damages remedy, in cases where the fee has not been fixed in advance quasi-contractual recovery appears to be recognized in *Bolton v. Marshall*,⁴⁴ particularly by a citation of the *Wellston* case.

Impossibility of Performance

An analysis of the general contracts problem of when "impossibility" may be claimed, a matter of complexity and careful distinctions, must precede the question of remedies.⁴⁵ Many of the decided cases, of course, involve only the question of whether impossibility terminates the primary duties of performance so as to bar remedies for breach of contract, for only part performance conferring benefits will raise a question of restitution.⁴⁶

Where a party to a contract has paid in advance the agreed price for services or goods and either part or all of the return performance becomes impossible without fault on either side, or because of any assumed risk on the part of the payer, unjust enrichment has occurred and restitution should be available.⁴⁷ It was so held in *McCammon v. Peck*,⁴⁸ a case in which the client had paid his attorney in advance the

⁴² 30 Ohio St. 92 (1876).

⁴³ 103 Ohio St. 382, 133 N.E. 792 (1921).

⁴⁴ 153 Ohio St. 250, 91 N.E.2d 508 (1950).

⁴⁵ See generally, Corbin on Contracts, ch. 74-78 (1950).

⁴⁶ *Id.*, at §§ 1367-1372; Restatement, Contracts, ch. 14 (1932).

⁴⁷ Restatement, Contracts § 468 (1932).

⁴⁸ 9 Ohio C.C.R. 589, 6 Ohio D.D. Dec. 504, 3 Ohio Dec. 232 (1895), *rev'd* without opinion, 56 Ohio St. 790 (1897), but facts and arguments, Ohio Supreme Ct. Dec. 886 (1901). Appellant's argument in the supreme court being directed at an interpretation

full fee agreed upon and the attorney died before completing more than a fraction of the services. The recovery was for the amount paid less the reasonable value of the services actually performed, the court holding the deduction necessary because if the attorney had not been paid, his estate would have been entitled to recover the reasonable value of partial performance in *quantum meruit*. The case is thus one with a possible right of restitution on either side. A similar right of restitution would arise in case of a contract to sell specific goods if the buyer paid in advance, and, before the risk passed to the buyer, the goods wholly or partially perished without the fault of either side, a result embodied in the statutory provision that the contract is avoided in one case and voidable in the other.⁴⁹

In a road construction case in which the contract appeared to assume the existence of a local supply of a specified material, when the subsequent determination was made that there was no such local supply, it was held that the duty of performance ended and a duty arose on the benefitted party to compensate the contractor for the partial performance to that point on the basis of the value of the materials furnished and labor performed.⁵⁰

Illustrative of the assumptions as to where risk of loss ought to fall as a means of determining "impossibility" and thus the presence or absence of restitutionary rights, are the two situations of contracts to build a house and to make repairs or additions to an existing structure. If the building is destroyed prior to completion of performance, only in the latter case is impossibility of completing performance found and restitution in the form of recovery pro tanto for labor and materials permitted.⁵¹ Recovery in this case, however, would seem to be limited to the contract rate.

Benefits Conferred by Plaintiff, Now in Default Under a Contract

In the earlier Ohio cases, as in a great many other jurisdictions, the party who had partly performed his undertaking but who could not claim substantial performance, generally went without recovery even under *quantum meruit*. Personal service for an agreed term, construction contracts, the sale of chattels and other transactions were included. It was true, however, that a liberalizing trend was under

of the retainer contract which would eliminate the issue of impossibility, the doctrine of the lower decision would not seem to be cast in doubt.

⁴⁹ Ohio Rev. Code § 1315.09 (1953); Ohio Rev. Code §§ 1302.11, 1302.71 (1961).

⁵⁰ State ex rel. Jewett v. Sayre, 91 Ohio St. 85, 109 N.E. 636 (1914).

⁵¹ Bailey v. Brown, 6 Ohio C.C. Dec. 440, 3 Ohio Dec. 120 (1895). See, as to problems of construing the contract, Bd. of Educ. v. Townsend, 63 Ohio St. 514, 59 N.E. 223 (1900); Corbin, §§ 1369-1372. As to the measure of recovery see Restatement, Contracts § 468(3).

way early.⁵² Many of the earlier Ohio cases were reviewed in *Kirkland v. Archbold*,⁵³ but the court concluded that such a drastic rule of forfeiture was not in keeping with a strong trend in other jurisdictions to the rule that the defaulting contractor may recover the reasonable value of the work done, less whatever damage the other party has suffered. Such relief is of course restitutional and usually pleaded in a *quantum meruit* count. The numerous clashing policies to be found in this area, and the conceptual and practical problems, have been too thoroughly discussed recently to need comment here.⁵⁴

Mutual Rescission

Not dealt with here is the "right to rescind" of the party who has partly performed before the other's repudiation or total breach of a contract or before the discovery of other grounds for avoiding the contract. Speaking in terms of "rescission" by one party or by a court of equity seems to be helpful language for demonstrating that the contract is no longer the measure of remedial rights and also a way of emphasizing the restitutional principle that if the complaining party has been benefitted, he must return by his own act or by court decree that benefit before he can get restitution. But the use of such figurative language has been questioned as unnecessary and occasionally misleading.⁵⁵ Such cases are here classified as to basic ground for granting restitution and without reference to the concept of rescission.

Whether mutual rescission of a contract is express or to be implied out of the conduct of the parties, if the parties have not expressly or impliedly agreed to an adjustment of claims arising out of performance prior to rescission, a duty of restitution will arise on the party unjustly enriched thereby. If a judgment for money will suffice, a quasi-contract action will lie. It would appear that express agreements to rescind usually do adjust performance claims for only one Ohio case, *Brown v. Johnston*,⁵⁶ was found involving subsequent suit for restitution. In that case the purchaser under a land contract had made substantial payments before default and surrender of possession to the vendors who then placed a notation on the contract that

⁵² A leading case in the personal services field is *Britton v. Turner*, 6 N.H. 481 (1834).

⁵³ 113 N.E.2d 496 (App., 1953).

⁵⁴ Nordstom and Woodland, "Recovery by Building Contractor in Default," 20 Ohio St. L.J. 193 (1959); Fischer, "Rights of Recovery by a Contractor on Building Contracts Partially or Substantially Performed," 11 U. Cin. L. Rev. 379 (1937); Corbin, Contracts §§ 1122-1135 (1950); Restatement, Contracts § 357 (1932).

⁵⁵ Corbin, Contracts § 1105 (1950).

⁵⁶ 95 Ohio App. 136, 108 N.E.2d 298 (1952).

by agreement the contract was cancelled and purchasers were released of all obligations. The principles of restitution would allow a deduction not only for the rental value during occupancy but also for damages done to the premises. Approving a judgment for a partial recovery of payments, the court noted that apparently proper deductions had been made on both grounds.

More numerous are the cases in which mutual rescission is spelled out of the conduct of the parties, either to defeat a suit for damages for breach,⁵⁷ or as a basis for giving relief for benefits conferred by part performance. In *Middleport Woolen Mills Co. v. Titus*,⁵⁸ plaintiff paid defendant \$10,000 at various stages of a three-year course of dealing involving a written contract and the ultimate frustration of the objective. Plaintiff's petition was for money had and received, the evidence was sharply conflicting, and verdict went for defendant. Assuming the district court had reversed the judgment on the ground the weight of the evidence showed the parties had put an end to the contract, the Supreme Court concluded, without feeling the need to cite authority, that plaintiff would be entitled to recover on his petition under those circumstances. *Lewis v. White*⁵⁹ involved a contract for the sale of land, a vendor who was unable to convey an unencumbered title, and a vendee who after two weeks offered to perform though without a tender or evidence of readiness to perform, followed by notice that vendee rescinded. When the vendor sued for damages for breach, the vendee cross-petitioned for the money paid on execution of the contract. The Supreme Court directed judgment for the vendee, declaring the vendee's good faith in offering performance and his readiness to perform were immaterial because his consent to rescission coupled with vendor's inability to perform for an unreasonable time, effected a mutual rescission. In *Rogers v. Simpson*,⁶⁰ similar facts were involved, and the court declared that vendee's default did "not deprive him of the right to be placed in the same position as before the contract was made," a statement which reflects the basic objective of restitution.

For Performance Under an Unenforceable Contract

Quasi-contractual recovery for benefits conferred by performance by plaintiff is commonly available in transactions where the contract

⁵⁷ *Hall v. Hall*, 32 Ohio St. 184 (1877); *Mowry v. Kirk Cheever*, 19 Ohio St. 375 (1869); *Dickson v. Wolin*, 18 Ohio L. Abs. 107 (App. 1934). See *Cantor v. Cantor*, 86 Ohio L. Abs. 452, 15 Ohio Op. 2d 148, 174 N.E.2d 304 (1959).

⁵⁸ 35 Ohio St. 253 (1879).

⁵⁹ 16 Ohio St. 444 (1866).

⁶⁰ 11 Ohio C.C.R. (n.s.) 561, 21 Ohio C.C. Dec. 103 (1908).

is voidable and avoided by plea of Statute of Frauds or illegality, though in the latter case only if policy does not forbid any relief.⁶¹

To be distinguished is the unusual Ohio doctrine that part performance under an oral contract for the sale of an interest in land, will take the contract "out of the statute" for purposes of suits at law as well as in equity, if the performance is strictly referable to the particular contract.⁶² In such cases, the remedy will be unliquidated damages or debt.

An excellent opinion in *Towsley v. Moore*⁶³ approved and carefully spelled out the application of the restitutional remedy to a contract not to be performed within a year. Plaintiff in effect agreed to become and remain a servant in the household of defendant until she should reach majority, a period of over six years, and defendant agreed then to pay plaintiff what her services should reasonably be worth. Suing after she reached majority, plaintiff's recovery was sustained against a plea of the Statute of Frauds. The Supreme Court declined to accept as a basis of decision the proposition that a fully performed contract is outside the statute because such reasoning seemed "to play fast and loose with both the contract and statute." It was much "more intelligent" to say that though the contract is void, the "party must pay for such advantage as he has received. . . ." To the argument that when there is an express contract there can be no implied contract, the court observed that "it can hardly be a dead letter upon one side and not on both." Insisting that the measure of recovery was upon the promise implied by law, not upon the alleged express terms which happened to be the same in that case, the court quoted:

[T]he recovery is not upon the contract, but upon the *quantum meruit* or *valebat*, or upon the money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party.

A count for money had and received in *Hummel v. Hummel*⁶⁴ was founded on an oral agreement that if plaintiffs would pay the premiums on a 15-year endowment policy on their son's life, the son and his wife would hold the proceeds for plaintiffs. After maturity and payment of the proceeds, quasi-contractual recovery was upheld

⁶¹ Krauskopf, "Solving Statute of Frauds Problems," 20 Ohio St. L.J. 237 (1959); Restatement, Contracts § 355 and ch. 18.

⁶² *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (1954); *La Bounte v. Brumback*, 126 Ohio St. 96, 184 N.E. 5 (1933); *Myers v. Croswell*, 45 Ohio St. 543, 15 N.E. 866 (1888); *Randall v. Turner*, 17 Ohio St. 262 (1867).

⁶³ 30 Ohio St. 184 (1876).

⁶⁴ 133 Ohio St. 520, 14 N.E.2d 923 (1938).

against a plea of Statute of Frauds, the opinion surveying numerous cases and authorities.

The case of *Hughes v. Oberholtzer*⁶⁵ is perhaps most safely used as an illustration of the difficulties of pulling together the cases and remedial principles in this field. Alleging an oral contract, the petition pleaded the facts specially and prayed damages for the non-performance of three of the four items of consideration for plaintiff's agreement to convey a tract of land. In performance of the oral agreement, plaintiff had conveyed the land when defendant paid \$20,000, the fourth item of consideration. Plaintiff's prayer was for approximately \$6000 and otherwise it was clear that defendant's non-performance was of substantial character. It seems impossible to infer the precise form in which the claim was presented to the Supreme Court except that quasi-contract recovery in some form was argued for and also recovery at law on the ground of part performance. The latter ground was rejected on the ground the part performance was insufficient under the Ohio rule. The court seemed to assume that if asked for, specific restitution of the land might be decreed in equity, or recovery of the *value* of the property transferred might have been sustained, both entirely sound under the principles of restitution, but apparently neither was sought. A common count for lands sold and conveyed⁶⁶ was, of course, the quasi-contractual cause of action. Whatever the character of the quasi-contract claim made, the court's attention was not directed to the correct ground for ascertaining the existence of unjust enrichment, *i.e.*, the retention of benefits from performance after repudiating the agreement under which they were received. The court found no unjust enrichment because plaintiff had not shown the land conveyed to be worth more than the sum received at that time from defendant. That basis of determining unjust enrichment is just as objectionable here as in the case of repudiation or breach of a nonvoidable contract.

Attorney fee contracts which are voidable because champertous,⁶⁷ because of client's lack of capacity to contract,⁶⁸ or because unconscionable,⁶⁹ and avoided by the interposition of the defense, "relegate" the attorney to his action on *quantum meruit*.

⁶⁵ 162 Ohio St. 330, 123 N.E.2d 393 (1954).

⁶⁶ Shipman, Common Law Pleading, 166-7 (3d ed., 1923).

⁶⁷ Brown v. Bruner, 10 Ohio App. 314 (1919).

⁶⁸ In re Habant, 18 Ohio Op. 473, 32 Ohio L. Abs. 446 (1940).

⁶⁹ American Vitrified Products Co. v. Crooks, 20 Ohio L. Abs. 627 (App., 1935), motion to certify overruled June 12, 1935; Roberts v. Lee, 72 Ohio App. 235, 51 N.E.2d 108 (1942).

Recovery of Benefits Conferred by Mistake

Starting with the simple case of overpayment induced by mistake,⁷⁰ where unjust enrichment results from the mistake,⁷¹ pleading in general assumpsit will generally be appropriate.

The question of recovering the payment of a check, the payment having been made by mistake, has arisen in a number of cases. In an early case,⁷² payment of a check by the drawee bank to a bank which had taken the check on a forged endorsement from a stranger without performing a local duty of checking identity, was held recoverable under a count for money had and received, as a payment made by mistake. Much more recently, the payment of a check issued upon fraudulent proof of performance directly to the "creditor's" assignee who did not stand in the position of a holder in due course, was held recoverable as money had and received to the use of the payee.⁷³ Restitutionary principles were applied in a different fashion, however, in a recent case⁷⁴ involving payment by mistake of a check by drawee bank after the bank had received a stop payment order. It was shown the payee of the check had a valid and subsisting claim against drawer at the time of payment, so the court held the bank might debit the amount on drawer's account. The court classified the bank's claim as in general assumpsit for money paid to defendant's use, quoting the Restatement of Restitution in finding that the payment was property of one person used in discharging an obligation owned by another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred.⁷⁵

In a many-sided case, after finding notes and a mortgage securing them to be void because payments from the proceeds of the notes were not made in compliance with F.H.A. regulations, it was held that payments made by the debtor on the notes before notice of the facts, might be recovered as made under mistake.⁷⁶

In a case between two municipalities,⁷⁷ a petition pleading the facts specially was upheld as stating a cause for quasi-contractual

⁷⁰ *Aluminum & Magnesium Inc. v. Grundstein & Sons*, 76 Ohio L. Abs. 555, 148 N.E.2d 239 (1956).

⁷¹ Restatement, Contracts, ch. 17 (1932); Restatement, Restitution, ch. 2 (1937).

⁷² *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628 (1855).

⁷³ *Firestone Tire & Rubber Co. v. Cent. Natl. Bank*, 159 Ohio St. 423, 112 N.E.2d 636 (1953).

⁷⁴ *Central Natl. Bk. v. International Sales Co.*, 87 Ohio App. 207, 91 N.E.2d 532 (1950).

⁷⁵ Restatement, Restitution § 162 (1937).

⁷⁶ *Botzum Bros. Co. v. Brown Lumber Co.*, 104 Ohio App. 507, 150 N.E.2d 485 (1957).

⁷⁷ *Indian Hill v. Cincinnati*, 153 Ohio St. 562, 93 N.E.2d 22 (1950).

relief, apparently money had and received. An intangibles tax payer had for several years reported his residence to be in Cincinnati though in fact it was in Indian Hill, and the taxes had been paid by the collector to Cincinnati. Relying on the Restatement of Restitution, the court found a cause of action stated in favor of the municipality to which the payment was due against the one to which the payment was made by mistake. The court distinguished this from cases where quasi-contractual recovery against a city is denied because failure to meet mandatory statutory requirements would make the express contract unenforceable and the policy of the statute would bar alternative relief.

Waiving the Tort and Suing in Assumpsit

That general assumpsit may be used to give a quasi-contract remedy as an alternative to a tort remedy has long been expressed in the old phrase which in form refers to an election of remedies but which may more usefully be read as referring to the advantages of assumpsit to plaintiff in terms of the longer statute of limitations for "contracts" not in writing,⁷⁸ simpler pleading and less risk of variance, or on occasion a more favorable measure of recovery, or even as a means of stating an otherwise ineligible claim in bankruptcy.

In *Woodward v. Suydam and Blydenburg*,⁷⁹ the principal's evidence that the defendant factors sold below the directed minimum was held admissible under a common count for goods sold and delivered to recover the market value of the merchandise. The alternative tort action would have been either trover for conversion or an action on the case for misconduct.⁸⁰ Assumpsit for goods sold and delivered was upheld in *Barker v. Cory*⁸¹ where plaintiff had delivered logs to defendant to be sawed into lumber and defendant converted the lumber to his own use. In *Sparrow v. Hosack*,⁸² the current owner of land subject to a judgment lien filed a petition which used the words money had and received to plaintiff's use, to recover the excess of defendant's bid at a sale over the amount due on the judgment, an amount which defendant had failed to pay the sheriff. Without making it clear what the alternative action would have been, and after saying that a count for money had and received was appropriate only when money had been received, the court did find a "perfect statement of a cause of

⁷⁸ *Mount v. Lakeman*, 21 Ohio St. 643 (1871); *Kirchner v. Smith*, 7 Ohio C.C.R. (n.s.) 22, 28 Ohio C.C.R. 25 (1905); *Paramount Film Distrib. Corp. v. Tracy*, 86 Ohio L. Abs. 225, 176 N.E.2d 610 (1960).

⁷⁹ 11 Ohio 360 (1842).

⁸⁰ *Laverty v. Snethen*, 68 N.Y. 523, 23 Amer. Rep. 184 (1877).

⁸¹ 15 Ohio 9 (1846).

⁸² 40 Ohio St. 253 (1883).

action" in that defendant "received the equivalent of money for which in justice and honesty he should have accounted to" plaintiff.⁸³ Privity was not necessary, so the court observed, to maintain assumpsit.⁸⁴ Perhaps less troublesome to classify would be such a case as suit against the husband who had received his spouse's separate money and could not prove it to have been a gift,⁸⁵ the person who has failed to account for public money received, whether as an official or otherwise,⁸⁶ or one who had sold plaintiff's property when sued in money had and received for the proceeds.⁸⁷

The fraud cases where a general assumpsit recovery has been sought appear to have been less common in Ohio than those in which relief was sought in equity or in replevin or conversion. An action to recover the premiums on insurance fraudulently sold to plaintiff was denied in one case only because plaintiff was not a party to the contract,⁸⁸ but was allowed in another.⁸⁹ The result of "rescission" in equity grounded on entrapment of plaintiff into a forfeiture, *i.e.*, the recovery of the premiums paid,⁹⁰ could have been accomplished in general assumpsit, so the case is illustrative of the relative freedom of choice in the area between law and equity. In a federal case in Ohio in 1923,⁹¹ the court did not find it necessary to decide whether a claim for excessive charges under a complicated cost-plus contract was in tort or in contract, but it did find an elaborate petition subject to a motion to make definite and certain. It might well be assumed that against such a complex background as that of such war-time contracts, a common count would not be tolerated under code principles, though the Ohio cases shed no light on the point. In a rather complex and confused course of dealings, with at least some mention of fraud, the court in *Womack v. Hollon*⁹² failed to make it clear that the use of a common count was inappropriate.

Duress

Since the background from which a claim of duress arises may be a contractual or tortious transaction or some other type of relationship, the classification of duress is based only on the fact of a com-

⁸³ *Id.* at 259.

⁸⁴ *Ibid.*

⁸⁵ *Yocum v. Allen*, 58 Ohio St. 280, 50 N.E. 909 (1898).

⁸⁶ *Mount v. Lakeman*, 21 Ohio St. 643 (1871).

⁸⁷ *Kirchner v. Smith*, 7 Ohio C.C.R. (n.s.) 22, 28 Ohio C.C.R. 25 (1905).

⁸⁸ *U.S. Life Ins. Co. v. Wright*, 33 Ohio St. 533 (1878).

⁸⁹ *Provident Savings Life Assur. Co. v. Statler*, 17 Ohio C.C.R. (n.s.) 59, 24 Ohio C. Dec. 391 (1911), *aff'd without opinion*, 88 Ohio St. 549, 106 N.E. 1073 (1913).

⁹⁰ *Union Central Life Ins. Co. v. Pottker*, 33 Ohio St. 459 (1878).

⁹¹ *United States v. A. Bentley & Sons Co.*, 293 Fed. 229 (1923).

⁹² 60 Ohio L. Abs. 465, 475, 102 N.E.2d 26, 33 (1951).

pulsion of plaintiff involuntarily to confer a benefit on defendant which amounts to an unjust enrichment.

Recovery under a count for money had and received was upheld in *Reinhard v. City*,⁹³ where after an illegal arrest the officer demanded and accepted a deposit in cash, an illegal substitute for bail, before he would release the prisoners. The court found the payment of the money was involuntary, and the money being received by the city, that it was held for plaintiff's use. The court found the principle well stated by Greenleaf:⁹⁴

Under the count for money had and received, the plaintiff may also recover back money proved to have been obtained from him by duress, extortion, imposition, or taking any undue advantage of his situation, or otherwise involuntarily and wrongfully paid. . . .

The voluntariness of the payment, rather than the basic form of relief, has been the difficult issue.⁹⁵

Other Examples of Quasi-Contract Recovery

The range of general assumpsit claims based on restitutional principles seems to be limited only by the appropriateness of a money judgment as a remedy and by precedents making some claims cognizable only in equity. Further search would no doubt uncover a considerable number of other Ohio precedents. Two fields of some breadth are mentioned as suggestive.

In the area of breach of fiduciary obligations, it was held in *Rice v. Wheeling Dollar Savings & Tr. Co.*⁹⁶ that allegations that defendant shareholders, officers or directors of the corporation, had acquired property with funds of the company and sold it for large sums of money, diverted company funds to personal purposes, and failed to pay interest to the company for use of company funds, stated a quasi-contractual cause of action and thus a "contract" claim within the terms of the attachment statute.⁹⁷

In the area of recovery of compensation for discharging the legal obligations of another, *Sommers v. Putnam County Bd. of Educ.*⁹⁸ upheld recovery on a quasi-contractual basis by a parent who transported his child to school under circumstances making it the duty of

⁹³ 49 Ohio St. 257, 31 N.E. 35 (1892).

⁹⁴ *Id.* at 269.

⁹⁵ *Union Properties, Inc. v. Cleveland*, 142 Ohio St. 358, 52 N.E.2d 335 (1943); *Columbus Citizens Telep. Co. v. Columbus*, 88 Ohio St. 466, 104 N.E. 534 (1913); *Baker v. Cincinnati*, 11 Ohio St. 534 (1860); *Mays v. Cincinnati*, 1 Ohio St. 268 (1853).

⁹⁶ 155 Ohio St. 391, 99 N.E.2d 301 (1951).

⁹⁷ Talbott, "Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies," 20 Ohio St. L.J. 320 (1959).

⁹⁸ 113 Ohio St. 177, 148 N.E. 682 (1925).

defendant to do so. The factors which kept the parent from being a volunteer and thus being barred from recovery were discussed with care. In this same area is *Smith v. Snapp*,⁹⁹ wherein it was held that when a husband leaves no estate, his widow is liable for expenses incurred during his last illness though she did not directly contract therefor. Basing the obligation in the statutes, one of the ancient bases of quasi-contractual obligation, a suit upon an account was upheld.

CONCLUSION

In the retrospect of history, one may well marvel at the genius that went into the construction of the action of assumpsit, an edifice founded on very simple concepts, yet adequate to provide the basis for very great developments in substantive and remedial law. In the division of general assumpsit there was even produced a form of simplified pleading which has seemed quite consistent with some of our most recent and advanced thought in that field. No brief, however, is submitted for a revival of training in the language and quiddities of this complex field of concepts. Since there are basic differences between the remedies of unliquidated damages, contract debt, and restitution, differences closely tied into the substantive law, perhaps those terms will have to serve instead of "damages," "implied promises," and suing on "the *quantum meruit*." Perhaps it has been demonstrated that in the old terminology, ambiguity was really built in.

⁹⁹ 87 Ohio L. Abs. 318, 16 Ohio Op. 2d 304, 175 N.E.2d 333 (1961).